UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SAVERA INDUSTRIES, INC.,
SUPERIOR BUILDING SERVICES INC. D/B/A SAVERA INDUSTRIES, INC.,
SUPERIOR CLEANING SERVICES D/B/A SAVERA INDUSTRIES, INC.,
as a single employer, AND
INDUSTRIAL STEAM CLEANING OF LONG ISLAND, as a joint employer

Respondents

Case No. 29-CA-193068

PERVIS WILLIAMS, an Individual

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO ADMINISTRATIVE LAW JUDGE BENJAMIN GREEN

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Now comes Counsel for the General Counsel Colleen Pierce Breslin and files this brief with the Honorable Benjamin Green, Administrative Law Judge, who heard this matter on November 1, 2 and 3, 2017 in New York, New York.

I. STATEMENT OF THE CASE

On August 3, 2017, the Regional Director for Region 29, acting for and on behalf of General Counsel for the National Labor Relations Board ("Board"), issued a Complaint and Notice of Hearing ("Complaint") that alleged that Savera Industries, Inc., Superior Building Services Inc. d/b/a Savera Industries, Inc., Superior Cleaning Services d/b/a Savera Industries, Inc., as a single employer and Industrial Steam Cleaning of Long Island, as a joint employer (collectively, "Respondents") have engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) of the National Labor Relations Act ("Act"). In their Answer to the Complaint, Respondents denied the unfair labor practices set forth in the Complaint.

The record evidence establishes clearly that Respondents violated Section 8(a)(1) of the Act by discharging Charging Party Pervis Williams ("Williams"). On November 18, 2016, Pervis Williams raised protected concerted complaints about Respondents' failure to pay employees on time, following discussions with coworkers about the delayed payments. Two days later, and in direct response to the protected concerted complaints, Respondents discharged Williams. They also threatened to have him arrested if he came back to work. Respondents acknowledge that Williams complained about not getting paid on time but deny that they discharged him. Instead, they claim to have offered Williams a different position and that he refused.

Based on the whole of the record, there is no question that Respondents discharged Williams in retaliation for his protected concerted activities and in such a manner that would discourage employees from exercising their Section 7 activities.

II. STATEMENT OF FACT

A. Background

1. Respondents

Savera Industries, Inc., Superior Building Services Inc. d/b/a Savera Industries, Inc., Superior Cleaning Services d/b/a Savera Industries, Inc. (collectively, "Respondent Savera") constitute a single-integrated business enterprise and a single employer under the Act. (Cpt. ¶ 9). Respondent admits Respondent Savera's single employer status. (Tr. 7, 210; Ans. ¶ 9).[1]

DO & CO NYC, a catering company that provides catering services for airlines who service John F. Kennedy Airport, operates a large scale catering facility at 149-32 132nd Street, Queens, New York. (Cpt. ¶ 7).[2]

Respondent Savera, as a single employer, has provided general maintenance and pot washing services to DO & CO NYC at this Queens facility since approximately 2009, with a short break in service between 2010 and 2012 ("DO & CO facility").[3] (Tr. 63 – 64, 276, 409 – 410). In

[1] Throughout this brief, references to the official transcript will be designated as "Tr." followed by the corresponding page number. References to the General Counsel, Respondent and Joint exhibits will be referred to as "GC Ex.", "R. Ex.", and "Jt. Ex." respectively, followed by the corresponding exhibit number.

[2] Paragraph 7(b) of the Complaint references paragraph 8(a). Correctly it should read as follows: Annually, Respondent Savera Industries, in conducting its business operations described above in paragraph *7(a)*, provided services valued in excess of $50,000 for DO & CO NYC, an enterprise directly engaged in interstate commerce in its business of providing catering services to airlines, including AirFrance, Lufthansa and Iberia. (emphasis added).

[3] See also Tr .231, 450-451.

discharge of its contractual duties, Respondent Savera has employed about twenty five porters, office cleaners, and pot washers at all material times.[4] (Tr. 231).

Beginning about January 2016, Respondent Savera contracted with Respondent Industrial Steam Cleaning of Long Island ("Respondent Industrial") to provide pot washing services at the DO & CO facility.[5] Since that time, Respondent Savera has possessed control over the labor relations policy of Respondent Industrial and has administered a common labor policy with Respondent Industrial for its employees. Accordingly, and as admitted by Respondents, Respondents Savera and Industrial have been joint employers of their respective employees who have worked at the DO & CO facility at all material times. (Tr. 8; Ans. 11; Cpt. ¶ 11[6]).

Kendall Harrington ("Harrington") is a part owner of Respondent Savera and has overseen its operations at the DO & CO facility since their commencement. Harrington has also overseen Respondent Industrial's operations at the facility since Respondent Industrial came in around January 2016 but he holds no ownership interest in that company. (Tr. 408). Respondent Industrial is owned entirely by Kimarie Wright. (Tr. 372).

At all material times, Harrington has managed personnel and payroll matters for both Respondents, including hiring and firing. (Tr. 408, 413). Harrington does not handle the day-to-day contract administration or supervision of employees at the DO & CO facility because

[4] There is no evidence that any DO & CO representative managed, supervised or otherwise oversaw any employee who performed services for either of the Respondents.

[5] Charging Party Pervis Williams was the only employee employed by Respondent Industrial at the DO & CO facility. All other pot washers and cleaning employees were employed by Respondent Savera. (Tr. 451 – 453).

[6] The Complaint erroneously contained two paragraphs with the number 10. It was amended to renumber the second paragraph numbered "10" in the Complaint as 11, and to then renumber all subsequent paragraphs accordingly. (Tr. 8).

Respondent Savera employs a series of supervisors and account managers to handle those matters. (Tr. 406-409).

Cherry Mellad ("Mellad" or "Cherry Mellad") has worked for Respondent Savera as an account manager at the DO & CO facility since about mid-2016. (Tr. 230). Mellad handles all on site aspects of the service contract, including day-to-day supervision of employees employed by both Respondents at the DO & CO facility. (GC Ex. 7, ¶¶ 4-8; Tr. 230 – 232; 275 – 278).

2. Charging Party Pervis Williams' Employment with Respondents

Charging Party Pervis Williams began working for Respondent Savera as a pot washer at the DO & CO facility in about 2009, until the company lost its service contract in about 2010 to a company called Busy Bee. (Tr. 63 – 66; 449 – 452). Williams continued his work at the facility as a pot washer for the duration of Busy Bee's service contract. When, in late-2012, Respondent Savera again obtained the service contract, Respondent Savera immediately hired Williams to continue his work as a pot washer. Williams was the first employee who Respondent Savera hired to work under this second contract. (Tr. 66-67). Williams' employment was transferred to Respondent Industrial when Respondent Savera began contracting pot wash services to Respondent Industrial. (Tr. 451 – 453).[7]

Williams worked uninterrupted for Respondents from the time he was rehired by Respondent Savera in 2012 until he was discharged in late-November 2016.[8] (Tr. 66 – 67). At all times

[7] In discharge of its contractual duties, Respondent Industrial employed only Williams as a pot washer, and no other employees. The terms and conditions of Williams employment with Industrial, including his job responsibilities, work schedule and supervision, were identical to those of his employment with Respondent Savera.

[8] Respondent Savera changed its name several times over the course of Williams' employment. Beginning in 2009 and for several years, Respondent Savera went by the name Superior Eco Living. (Tr. 449 – 450). At some point thereafter, It then changed its name to Superior Industrial and then, in about September 2016, it changed its name again to Savera Industries Inc. (Tr. 450 – 451). As mentioned above, about January 2016, when Respondent Savera

during his employment with Respondents, Williams worked as a pot washer on the morning shift (5:00 am to 1:30 pm). He was responsible to wash pots in one of the two kitchens at the DO & CO facility. (Tr. 67 – 68).[9] At all material times, his job title and responsibilities remained the same.

Harrington hired Williams but at all relevant times, Mellad and other on-site supervisors supervised him. Between about mid-2016 until his discharge, he was supervised directly by Mellad. (Tr. 23, 63 – 67, 449 – 452).

B. Williams Engaged in Protected Concerted Activity on November 18, 2016

Employees' regularly scheduled payday is Friday. Mellad or Harrington are supposed to pick paychecks up at the off-site payroll office and deliver them to employees at the end of their respective Friday shifts but often, they do not deliver the paychecks on time. (Tr. 28-29, 54-55, 121-22.) During Williams' tenure, Respondents failed to pay employees on time about once or twice a month, and they did not receive their paychecks until the following Monday or later. *Id.*

Due to a previously scheduled personal matter, Respondent Williams was off of work on Friday, November 18, 2016.[10] He did however he did go to the DO & CO facility around 5:00 pm that day to pick up his paycheck. (GC Ex. 10, Tr. 76-80). When he arrived, he entered the building to use the bathroom. In the elevator, he ran into Debbie Lyn, who works for Savera as a

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began contracting a portion of its potwashing services to Respondent Industrial, Harrington "started" Williams working for Respondent Industrial. (Tr. 451 – 452).

[9] Respondents employed between two and three pot washers in each kitchen on each of three shifts. Tr. 69:15-19.

[10] Williams had a meeting with an attorney with the Queens' Community Board 8. Accompanied by his sister-in-law Hazel Cunningham, he left his house early in the morning, attended the 9:45 am meeting and arrived home around 2:00 pm. (Tr. 76-80, 479-490). After arriving home, he made himself a meal and left for the DO & CO facility around 3:00 pm. Because it takes him two hours on public transportation, he did not arrive until about 5:00 pm. Cherry Mellad had earlier given Williams permission to take the day off to attend a meeting with an attorney.

supervisor.[11] (Tr. 87 – 90, 499). Lyn was crying. Williams asked Lyn why she was crying. She told him that Respondents were not going to pay employees that day and so she did not have any money to buy food for her baby.[12] Williams used the bathroom and went back outside.[13] Williams saw several other of Respondents' employees outside waiting for their paychecks. They were all looking for Mellad, asked Williams if he had seen her and if he knew anything about their money. They were angry and said that they wanted their money. (Tr. 89-90).

As noted above, this was far from the first time that Respondents were late in paying its employees. Delays happened as frequently as once or twice a month and as frequently, Williams and his coworkers discussed their frustrations about not getting paid on time. On occasions, they raised the complaints with management but largely employees were too worried about retaliation to speak up. (Tr. 28-29, 54-55, 121-22).[14]

The other employees left as it began to get darker but Williams continued to wait outside for Mellad to come out with the paychecks.[15] He waited on the sidewalk around the side of the

[11] Williams understood the Debbie in the elevator's last name to be "Watson" but upon seeing Debbie Lyn testify in the instant proceeding, he testified that Debbie Lyn is the individual he met in the elevator on that day. (Tr. 498:16-22). Though Lyn held the title of "supervisor", the record contains no evidence that she was a supervisor under Section 2(11) of the Act.

[13] Employees were required to wait outside the building to receive their paychecks, and were not permitted inside the building when off-duty unless they had permission to use the bathroom. (Tr. 88).

[14] Employees had and discussed pay issues beyond the delays in payment. For example, in early 2016, Williams was not paid for overtime that he worked. (Tr. 122). After repeatedly asking Harrington for the money he was owed, Williams brought the issue before a DO & CO supervisor. (Tr. 122 --- 123). Though he eventually received his unpaid wages, Respondent never again assigned Williams overtime work. (Tr. 124). Former employee Serafin Paul testified that her paycheck was short on many occasions but when she voiced her concerns to Harrington, they fell on deaf ears. (Tr. 26 – 27).

[15] He did not have money for bus fare to get home.

building where people were permitted to smoke.[16] At about 6:30 pm, Respondents' night supervisor Earl Mellad ("Earl") passed by.[17] (Tr. 90, 96, 101-102). Williams called out to Earl and Earl walked over toward him. Williams said, "What's up? We're not getting no pay today?" Earl told him that he was going to get to the "bottom of "this thing." (Tr. 102 – 103). Williams said, "I don't want to hear about no bottom of things. I want to know if we're going to get paid." He told Earl that the employees who work directly for DO& CO NYC have no problem getting their paychecks and that Respondents' employees – the employees who are actually "inside there doing the dirty work" – should get paid the same way. *Id*. Williams said that if Respondents' employees went on "strike then the whole place have [*sic*] to shut down" and that it was not reasonable to treat them "like that." Earl told him the conversation was "finished" but not before telling him that the boss had "plenty more in line" and that he could leave if he was not satisfied. Williams told him that he wasn't talking about leaving, he was "just talking about our money." *Id*.

Before Earl left, he told Williams that Respondents could not pay its employees if DO & CO NYC did not pay them, to which Williams reminded him that "we are living off from paycheck to paycheck." (Tr. 103 – 104). He also accused Williams of talking to him "hard." Williams told him that he was not talking to him hard, he was just telling him the truth.[18] *Id.* Earl left Williams sitting on the curb in the dark. Around 7:00 pm, realizing he was not going to get

[16] There was some confusion about the exact location of this conversation, which was compounded by counsels asking Williams to identify the location on a 8.5 X 11 birdseye view photograph of the facility. (R Ex. 1). Though Williams was unable to pinpoint on R. Ex. 1 where the conversation took place (e.g. he repeatedly pointed to a location on the blank side of the paper), he repeatedly made clear that the conversation took place on a corner on the side of the building where the front door of the building could not be seen. (Tr. 105-107).

[17] Williams understood Earl Mellad's name to be "Gary" but evidence at hearing revealed that it is actually Earl Mellad, who also goes by the name "Earl. (Tr. 473). Earl Mellad is Cherry Mellad's husband. (Tr. 252).

[18] Williams "talk[ed] to [Earl] like a man, like a gentleman for I respect him," and denies using any profanity or inappropriate language. (Tr. 109). Williams remained seated over the course of this conversation. (Tr. 112).

paid, Williams made his way for home. Without bus fare and relying on kindnesses of bus drivers, he had to take three different buses to get there. (Tr. 112). Williams did not speak to Mellad or Harrington on November 18. (Tr. 113).

C. Respondents Discharged Williams on November 20, 2016 and Notified Him of His Discharge on November 21, 2016

On Sunday November 20, 2016, Respondents discharged Williams's employment on because his "services were no longer needed." Harrington admitted that fact in an April 2017 letter to Region 29 but he did not personally communicate this decision to Williams on November 20 or at any time thereafter. (GC. Ex. 9(b)).

Williams was next scheduled to work at 5:30 am on Monday, November 21. (Tr. 114). At about 2:30 am that morning, Cherry Mellad called Williams on the telephone. She told him she had heard he was cursing outside the building on Friday and asked him what had happened. (Tr. 114, 181). Williams explained to her everything that had happened at the DO & CO facility on Friday and Cherry listened without saying anything. (Tr. 114-115; 166). Cherry then told him to hold on and passed the phone to Earl Mellad. (Tr. 252). Earl got on the telephone, and told Williams that he was fired and if he was seen back in the building, he would be arrested. (Tr. 115, 166).

Later that day, a coworker called Williams to tell him that the paychecks had arrived. Williams went to the DO & CO facility to pick up his check. In light of Earl's threat, Williams was worried that he might be arrested so he reported directly to the front desk and asked them to contact Cherry Mellad. Cherry brought him upstairs and handed him his paycheck. (Tr. 117). Williams asked Mellad if she was going to pay him two weeks for firing him and she said that she was not. *Id*. He told her that he was going to take the matter to the Labor Board and she said

that he could do whatever he wanted to. Mellad told him that she had nothing against him, they hugged and Williams left the facility.[19] (Tr. 118).

Williams returned to the facility on Friday, November 25 to pick up his last paycheck, for work during the week of November 14, and has not returned to the facility since.[20] He has not spoken to Respondents' managers, supervisors or representatives since with the exception on a call he made to track down his W-2.

D. Williams' Work Record

By all accounts, Respondents held Williams in high regard throughout the course of his employment, as an employee and as a human. As mentioned above, Harrington immediately rehired Williams when Respondent Savera won their second contract at the facility; in fact, he was the first employee who Harrington hired to work under the second contract. (Tr. 66-67). Harrington told Williams that he was "so glad" to find that Williams still working at the facility because he was such a "good worker." *Id.* By Harrington's own testimony, Williams was "one of his "best guys working on the job." (Tr. 413 – 415). He was reliable – the one employee who was always willing to show when other employees called out – and such an effective pot washer that Harrington regularly called on him to train new employees. *Id.*

Harrington and other on-site supervisors, including Mellad, remarked regularly compliment Williams' hard work, including on one occasion a few months before Williams was terminated

[19] Cherry Mellad admits that Williams picked up his final paychecks after they spoke on November 21 but her testimony about when he picked them up shifted over the course of her testimony.. During the early part of her hearing testimony, she testified clearly that Williams came to the DO & CO facility o November 21 to pick up his check and clean up his locker. However, when confronted with her affidavit statement that she did not see Williams again until November 25, she became confused about when she next saw him, how many paychecks she gave him and whether she spoke to Harrington before or after he picked up his paycheck. (Tr. 253, 303-305; GC Ex. 7, ¶ 19).

[20] Respondents' payroll system is designed that employees are not paid for a week worked until the following Friday. (Tr. 119). Accordingly, that check, dated November 18, 2016, paid him for hours worked during the week of November 7. (GC Ex. 9(b), p. 4).

when Harrington told other employees in the kitchen that "Mr. Williams is me [*sic*] best worker that I ever have," that Harrington can call him to work at any hour, even when he is in "the bed from beside [his] wife" and that "he's the only one we can count on." (Tr. 125 – 127).

Williams never received discipline or any other notice that Respondent believed he violated workplace rules.[21] (Tr. 133-134).

III. ARGUMENT

A. *Wright Line* Standard

Under the applicable *Wright Line* test, General Counsel has the initial burden of establishing that an employee's protected activity was a motivating factor for the adverse employment action taken against the employee.[22] General Counsel meets this initial burden by establishing evidence to the following elements: (1) the employee was engaged in protected activity; (2) the employer had knowledge of that activity; (3) the employer harbored animus towards the employee's protected activity and (4) there was a motivational nexus between the employee's protected activity and the adverse employment action. *See, e.g. Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries, Inc.*, 341 NLRB 560, 562, 563 (2004); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004); *The Hays Corp.*, 334 NLRB 48, 49 (2001).

Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Robert Orr/Sysco Food Services*, 343

[21] At hearing, Respondents presented an undated Warning Notice that they claim was issued to Williams. The Notice purports to chastise Williams for a November 7 incident. (Tr. 257 – 263, 426). Williams denies both the incident and that he ever received the Warning Notice. (Tr. 133).

[22] W*right Line, Inc., 251* NLRB *1083 (1980),* approved in *NLRB v. Transportation Management Corp., 462* U.S. *393, 399-403 (1983).*

NLRB 1183, 1184 (2004); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); *Ronin Shipbuilding*, 330 NLRB 464 (2000). The Board has long held that where adverse action occurs shortly after an employee has engaged in protected concerted or union activity an inference of unlawful motive is raised. *Manorcare Health Services – Easton*, 356 NLRB No. 39 slip op. at 3, 25 (2010), enfd. 661 f.3d 1139 (D.C. Cir. 2011). See *McClendon Electrical Services, 340 NLRB* 613, fn. 6 (2003) (citing *La Gloria Oil*, 337 NLRB 1120 (2002), enfd. Mem. 71 Fed. Appx. 441 (5th Cir. 2003). Additionally, as part of its initial showing, General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Sepc Painting, Inc.*, 339 NLRB 946, 949 (2003); *Real Foods Co.*, 350 NLRB 309, 213 fn. 17 (2007) (unlawful motivation demonstrated not only by direct, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action).

B. The Evidence Establishes that Respondents Violated Section 8(a)(1) of the Act by Discharging Pervis Williams in Retaliation for His Protected Concerted Activities

1. Pervis Williams' Expression of Employee Complaints about Late Payment was Protected Concerted Activity

Section 7 of the Act protects the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" with respect to wages, hours or other terms and conditions of employment. *Hahner, Foreman & Harnass, Inc.*, 343 NLRB 1423, 1424 (2004). "There can be no doubt that there is no more vital term and condition of employment than one's wages, and employee complaints in this regard clearly constitute protected activity." *Rogers Environmental Contracting*, 325 NLRB 144, 145 (1997), quoting *Cal-Walts, Inc.*, 258 NLRB 974, 979 (1981).

An individual employee's protected activity is concerted if it is a logical outgrowth of discussions with coworkers about a collective concern or otherwise, raises a "truly group complaint to the attention of management" *Meyers Industries*, 281 NLRB 882, 887 (1986) (*quoting Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Needell & McGlone, P.C.*, 311 455, 456 (1993) (individual employee's complaint concerted because it was a logical outgrowth of discussions with other employees about a supervisor's preferential treatment of a coworker). *Worldmark by Wyndham*, 356 NLRB No. 104, slip. op. at 2 (Mar. 2, 2011) ("the concerted nature of an employee's protest may, but need not, be revealed by evidence that the employee used terms like 'us' or 'we' when voicing complaints, even when the employee has not solicited coworkers' views beforehand.").

Wages, being "probably the most critical element in employment, are "the grist on which concerted activity feeds." *Parexel International, LLC*, 356 NLRB No. 82 at p. 3 (2011), quoting *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996). *Whittaker Corp.*, 289 NLRB 933, 933-934 (1988); *Trayco of S.C., Inc.*, 297 NLRB 630, 634-635 (1990) (discussions about wages inherently concerted), enf. denied mem. 927 F.2d 597 (4th Cir. 1991); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992) (same), enfd. mem. 977 F.2d 528 (6th Cir. 1992). Further, "[e]mployee mutual support for betterment of their working conditions including improvement in pay and timing of pay constitutes classic concerted activity protected under the Act." *Cherokee Heating Co.*, 280 NLRB 399, 403 (1986).

Williams raised a "truly group concern" with Earl Mellad on November 18 when he protested Respondents' failure to pay employees, and he was clear about this. (Tr. 101-103). He used collective pronouns throughout the conversation (e.g. "*we're* not getting no pay today?", "I

want to know if *we're* going to get paid.", "I was talking about *our* money.") and also raised the possibility of employees going on strike, which is an explicitly collective action.

Williams' expression of this "truly group concern" was a logical outgrowth of the discussions he had with other employees. The evidence is clear that in the minutes preceding this conversation with Earl, Williams had numerous conversations with employees who were also upset that they would not be paid. Most he met outside of the building, waiting for Cherry to emerge with their paycheck and angry when she did not. Tr. 89-90. One employee named Debbie Lyn was so distraught about not being paid that she was brought to tears.[23] (Tr. 87, 499).

November 18 was far from the first time that employees commiserated about Respondents' late payment of their wages. Frequently employees were made to wait hours after their shifts to receive their paychecks and at least once or twice a month, they were made to wait until the following week to receive their paychecks.[24] As frequently as they were not paid on time, employees discussed their frustrations with these delays. Williams and former employee Serafin Paul testified clearly and credibly that employees discussed their concerns about the late payments on a regular basis. (Tr. 26-27, 28-29, 54-55, 121-124).

[23] Lyn's denial of this incident is not credible. First, she continues to rely on Respondents' for her livelihood and it is unlikely that she would testify in a manner adverse to current employer. Further, and as will be discussed in greater detail below, specific elements of her testimony are improbable in light of other credible witness

[24] Respondents deny that it ever paid employees late and seem to claim that the only reason Williams did not receive his paycheck on November 18 is because he left the building before Cherry Mellad could pay him. Curiously, Respondents presented no evidence to show that other employees were paid on November 18, which would surely be the most compelling way to dispute Williams' claim. They did present a series of irrelevant bank statements from September and October 2017 that Kimarie Wright claims to show that Respondents always paid employees on time. Neither Wright's testimony nor these records show anything of the sort. (R. Ex. 4, 5; Tr. 385-396, 400-403).

2. Williams Testified Credibly that He Communicated his Protected Concerted Activity to Respondents

As mentioned above, by explicitly referencing other employees in his November 18 conversation with Earl Mellad, Williams apprised Respondents that he was raising a group concern. See e.g. *Colders Furniture*, 292 NLRB 941, 942-43 (1989) (employee's "use of the pronoun 'we' in his protests at the meeting clearly apprised [the employer that the employee] was speaking not solely on his own behalf."); *Dickens, Inc.*, 352 NLRB 667, 672 (2008). *Whittaker*, 289 NLRB at 934; *Grimmway Enterprises, Inc.*, 315 NLRB 1276, 1279 (1995).

Williams' testimony regarding the events of November 18 is beyond reproach. From start to finish, he told the exact same story with specificity and depth. (e.g. compare Tr. 87 – 90 with 499, Tr. 117 with. 185, 101-103 with 191-192). In contrast, Respondents presented two witnesses – Earl Mellad and Debbie Lyn – whose testimonies range from not credible to preposterous. First, in light of the holes in Earl Mellad's whole testimony, his denial of conversations with Williams on November 18 and November 21 are not credible. Specifically, when he testified about a 2016 altercation between Williams and another pot washer during which Williams was "very hostile" to another employee, he raised a serious concern about Williams as an employee. That no other witness, including Harrington or Cherry Mellad, mentioned this serious accusation calls it into question and undermines the overall integrity of Earl Mellad's testimony.

Lyn's rendition about the events of November 18 are as unlikely as they are impossible. She testified that around 1:30 pm, she saw Williams outside the front door, yelling things like, "I want my fucking check. They better not play with [my] check" and that he threatened to "go get his knife" and go back into the building to "stab [Cherry Mellad]." (Tr. 358). To begin, Williams was nowhere in the vicinity of the DO & CO facility anytime around 1:30 pm on that

day. That he was tied up with an attorney meeting that entire day and did not arrive at the DO & CO facility until 5:00 pm is confirmed by his and Hazel Cunningham's clear testimony.[25] Further, despite Lyn's claims that he repeatedly and specifically threatened physical violence, Respondents took no action against Williams. Lyn neither called the police nor immediately reported the physical threats to Mellad. (Tr. 246 – 250, 360-365, 467). Mellad and Harrington are unclear about what they knew about Williams' threatening conduct but they are clear that Respondents did not consider it serious enough to take any action against Williams for his purported behavior.[26] Such non-action in the light of purportedly outrageous conduct is simply not believable. Neither is Lyn.[27]

3. The Total Record Evidence Establishes Clearly that Respondent Harbored Animus toward Williams' PCA

a) Williams' credible testimony about his conversations with Earl Mellad establishes Respondents' animus toward his protected concerted activity.

Williams credibly testified that Earl Mellad told him on November 18 that Respondents had "plenty more in line" and that he could leave if he was not satisfied. The following day, Earl Mellad threatened to call the police if he stepped back on the DO & CO facility. Earl made both

[25] Cunningham, who accompanied Williams to his attorney meeting, gave detailed testimony that she was with Williams from the early-morning until at least 2:00 pm, when she dropped him at his home. Because it takes Williams about two hours to travel from his home to the DO & CO facility, even the most narrow estimate of time would not bring Williams to the DO & CO facility before at least 4:00 pm. That is more than three hours after Lyn says that she saw him there. (Tr. 76-81, 479-490).

[26] Harrington stated that he never heard that Williams used profanity or threatened anyone with a knife on November 18. (Tr. 467). Mellad testified at the hearing that Lyn told her something "about a knife" but in her affidavit, she stated only that she understood "he was using profanity and yelling in front of the building." (Tr. 297, 312-320, GC Ex. 7, ¶¶15-16).

[27] Lyn's description of Williams stands in stark contrast to other descriptions of him, who was otherwise known to Respondents as a responsible, respectful person. In the words of Cherry Mellad, Williams is a "lovely man. I respect him very much." (Tr. 283). By Harrington's own testimony, Williams was "one of his "best guys working on the job." (Tr. 413 – 415).

statements in direct response to Williams' protected concerted concerns. Both signal Respondents' animus. The first statement, though not alleged to violate 8(a)(1), constitutes useful background evidence of Respondent animus toward employees' union support. *McDaniel Ford, Inc.*, 322 NLRB 956, 956 fn. 1 and 962 (1997); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (finding employer's statement that, if complaining employee was unhappy, "[m]aybe this isn't the place for you . . . there are a lot of jobs out there" was implied threat of discharge); *Intertherm, Inc.*, 235 NLRB 693, 693 fn. 6 (1978); *Indian Head Lubricants*, 261 NLRB 12, 21 (1982) (employer statement that "There's the door" is an implied threat of firing) The second statement, which is alleged, is a textbook threat and crystal clear evidence of animus. *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003); *Douglas Aircraft Co*., 307 NLRB 536 fn. 2 (1992).

This was not the first time Respondents expressed animus toward an employee for vocalizing a protected concerted concern about the terms and conditions of employment. After employee Serafin Paul pushed back on supervisors at an employee meeting for threatening to deduct employees' pay for periods of time when they were on the clock working, Cherry Mellad told her that "Harrington doesn't want you to be working for him no more because you are always being rude." (Tr. 32 – 35). This statement, made in direct response to Mellad's protected concerted activity, evidences that Respondents harbored animus toward employees' protected concerted activity.[28] (Tr. 35).

[28] Though Serafin Paul's discharge is not being litigated in the instant case, Respondents' statement to her evidences Respondents' tendency to harbor animus toward employees' protected concerted activity. *Boddy Construction Co.,* 338 NLRB No. 165 (2003), 338 NLRB No. 165, slip op. at p. 1, citing *James Julian, Inc. of Delaware,* 325 NLRB 1109 (1998) employer complaints about 'bad attitude' are often euphemisms for Section 7 activities, particularly when there is no alternative explanation for the perceived "attitude" problem."); *Promenade Garage Corp.*, 314 NLRB 172, 180 (1994) ("attitude" there a euphemism for a prounion attitude and therefore indicative of,

b) Respondents' shifting defenses further support a finding that Respondents harbored animus toward Williams' protected concerted activities.

When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F. 2d 363, 372 (9th Cir. 1983). The Board has consistently held that such "shifting and inconsistent justifications for an adverse personnel action often provide a basis for concluding that such actions were discriminatory." *Bebley Enterprises, Inc.*, 356 NLRB No. 64, slip. op. at 10 (Dec. 29, 2010); See *Colonial Parking & Unite Here Local 23*, 363 NLRB No. 90 (2016); *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014) (finding of animus supported by persuasive evidence that employer's reasons for discharge were pretextual and included the use of shifting explanations); *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action); *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007) (unlawful motivation demonstrated not only by direct but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action).

During the hearing, Cherry Mellad and Harrington insist that they did not discharge Williams but instead, he walked off the job of his own volition. In glaring contrast to this testimony is Harrington's written admission, set forth in an April 2017 letter to Region 29, that "Mr. Williams's services were no longer needed and he was terminated on November 20, 2016."

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in effect, animus)

(GC Ex. 9(b)). This one sentence, written and detailed, tells the truth – that Respondents discharged Williams two days after he engaged in protected concerted activity. All other defenses are clumsy efforts by Respondents to justify its unlawful conduct, and its grasping compels a finding of animus.

Cherry Mellad stumbled over these inconsistencies during her testimony. In response to the Administrative Law Judge's questions about the telephone conversation between Cherry Mellad and Williams in the early-morning hours of November 21, she stated the following, "[Williams] said he knew his rights..because we fired – I mean, we fired – I mean, if I – I did not say he was fired…I said – I said just don't show up until further and that was it. I never use the word fired to him." (Tr. 331 – 332). Like Harrington's letter, Cherry Mellad's testimony speaks for itself and proves, in no uncertain terms, that Respondents fired Williams and then struggled for a way to justify its unlawful conduct.

4. The Evidence Establishes that Williams' Protected Concerted Complaints Triggered Respondents' Decision to Discharge Him

In the early-morning of November 21 – two days after Williams engaged in protected concerted activity and Earl Mellad admonished him for it – Cherry Mellad and Earl Mellad called Williams to inform him that he was taken off the work schedule. Williams credibly testified that after he explained to Cherry Mellad about his conversation with Earl on November 18, she passed the telephone to Earl, who told Williams he was fired. Based on this clear and detailed testimony, there is no question that he was discharged because of this protected concerted activity.

Cherry Mellad admitted that she called Williams to discuss his November 18 activities. Though she claims that she understood he raised protected concerted complaints to Debbie Lyn

rather than Earl Mellad, she is clear the purpose of her call was to discuss what happened and to inform him of Respondents' decision to take him off the schedule. (Tr. 329, 331-332).[29] There is no question that this decision was in response to Williams' protected concerted protests about late payments.

C. Respondents' *Wright Line* Defense Fails Because They Cannot Establish They Would Have Taken the Same Action Against Williams In the Absence of His Protected Concerted Activity

Once General Counsel makes a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's adverse employment action, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse employment action, even in the absence of the employee's protected activity.[30] The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the action would have taken place even absent the protected conduct. *Williamhouse of California, Inc*., 317 NLRB 699, 715 (1995) (citing *Roure Bertrand Dupont,* Inc., 271 NLRB 443 (1984)); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If the employer's asserted reasons are found to be false, the Board may infer that the reason for the discharge was unlawful. *Yesterday's Children, Inc.*, 321 NLRB 766, 768 (1996) (citing *Shattuck Denn Mining Corp. v.*

[29] Cherry Mellad's testimony and affidavit are inconsistent about important details – specifically, who told her about the Friday incident and when she spoke to Williams about it. Nevertheless, both state clearly that her decision to take him off the schedule was related to his protests about late payment. Tr. 297, 312-320. In his affidavit, she states: "What I heard was that he was arguing about his check – yelling because he had not received it – and was using profanity in front of the building….In the following days, he was off for the weekend and, I called him and told him, "okay, don't show up to work until further notice." (GC Ex. 7, ¶¶ 15, 17). At the hearing, Cherry Mellad testified: "I just said I heard of the incident that happened on Friday and I give him a chance to say what he did. He said that he – I guess he say he come to pick up his check and no one had his check." (Tr. 331, 332).

[30] The same pretext evidence used to prove discriminatory motive may show that the employer had not established that it would have taken the same adverse action absent the employee's protected activity. *Wright Line, 251* NLRB at *1091.*

NLRB, 362 F.2d 466 (9th Cir. 1966)). If an employer fails to satisfy its burden of persuasion, a violation of the Act should be found. *Id.*

The Board has consistently held that a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Lucky Cab Co*., 360 NLRB No. 43 slip op. at 8; *Stevens Creek Crysler Jeep Dodg*e, 357 NLRB 633, 636-37 (2011), enf'd. sub nom. *Mathew Enterprise, Inc. v NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012); *Real Foods Co.,* 350 NLRB 309, 312 fn. 17 (2007) (unlawful motivation demonstrated not only by direct but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action).

1. Respondents' *Wright Line* Defense is Not Credible

During the hearing, Respondents claim that Williams "walked off the job" of his own volition by refusing the accept a position as a pot runner. This is a lie, controverted directly and unequivocally by Harrington's own April 2017 letter to Region 29 which states, "Mr. Williams's services were no longer needed and *he was terminated on November 20, 2016*." (emphasis added) (GC Ex. 9(b)). Neither Harrington nor any other witness disputed this unequivocal admission that Respondents discharged Williams on November 18, or otherwise explained it.[31]

In support of this lie, Respondents submit that they gave Williams an ultimatum on November 21 – he could either return to work as a "pot runner" or not return at all – and that

[31] Harrington's testimony about the events of November 18 through November 21 is highly improbable. He remembered that Cherry Mellad told him that there was an incident with Williams on November 18 and "there was profanities and threats" but insists that Cherry did not go into detail because he was "busy working." He denies giving Cherry Mellad any directives about how to deal with it but said he suggested to Cherry Mellad that they offer Williams a dish runner position because he could not bring himself to fire Williams. Tr. 428-429.

Williams opted not to return to work. [32] The suddenness of Respondents' ultimatum undercuts the credibility and logic of its defense. Respondents admit that at no time prior to or since November 21 did they employ a pot runner at the facility. Cherry Mellad claims that in the months preceding the ultimatum, Respondents became concerned that Williams could not perform his basic job duties. According to Cherry Mellad, Respondents offered Williams the pot runner position on at least two occasions between late-October 2016 and November 21 and both times Williams refused. Cherry Mellad and Harrington claim to have discussed these concerns but both admit that at no point prior to November 21 did they contemplate requiring Williams to accept the pot runner position or otherwise discharging him for his inability to perform his job. (Tr. 295-296, 298, 434).[33]

Respondents' claim that they issued Williams an ultimatum on November 21 and that this ultimatum had nothing to do with his protected concerted activity lacks all elements of credibility.

2. Respondents' *Wright Line* Defense is Illogical

To hear Respondents tell it, Williams was both a troubled employee and an exemplary one. They admit that he raised protected concerted complaints to management on November 18 – that he was angry about not being paid – but claim that he did so in conjunction with threats to "stab" Cherry Mellad and others inside the facility. Despite this allegedly dangerous behavior, Respondents had no security or safety concerns about Williams, took no action against him for

[32] The pot runner position was a position that would require an employee to transport dirty pots and pans between kitchens. Tr. 434.

[33] In her affidavit, Mellad stated, "I didn't want to force him to take a position he didn't want." (GC Ex. ¶ 13). Harrington testified that he and Cherry first discussed moving Williams into the pot runner position about a week before his discharge but that there was never any discussion about firing Williams from his pot wash position because he could not perform his duties or if he decided not to take the pot runner position. (Tr. 434, 467-468).

his activities and continued to hold him in high regard as an employee.[34] Their decision to take him off the schedule was not related to his November 18 activities but instead to Respondents' long-existing concerns that he was unable to perform basic job duties.

None of this makes any sense. Whether Respondents admit that the reason they too him off the schedule because of his November 18 activities, or that they claim it was purely coincidental that they issued him an ultimatum right after these activities, the evidence does not support any elements of their *Wright Line* defense.

D. **Credibility of Respondents' Witnesses**

As mentioned above, Williams' testimony is above reproach. He testified without exaggeration and from start to finish, he told the exact same story with remarkable specificity and depth. At several points during his cross examination, Respondents' counsel asked leadings questions in a manner that Williams became confused. Each and every time, when Williams came back to understanding, his testimony replicated identically the testimony he gave at other points of the examination.[35]

In contrast, Respondents' witnesses were inconsistent, disingenuous and untrustworthy. First, their collective testimony paints such a picture of Williams' work and character so fractured that it cannot be believed. On one hand, Respondents' witnesses filled the record with irrelevant, non-specific testimony about misconduct they claim Williams engaged in, including

[34] That Respondents had no safety or security concerns about Williams, and that he was welcome to continue working there following his activities on November 18 would nullify any argument that he somehow lost protection of the Act under *Atlantic Steel Co*., 245 NLRB 814 (1979) or other related cases. Nevertheless, as described above, Lyn's testimony about Williams' conduct on November 18 is highly suspect.

[35] E.g. Tr. 169-172 ("Please, sir. I'm telling you that is [Earl Mellad] said I am fired, not Cherry."); 179-180 ("That is false.")

drinking on the job and sexually inappropriate conduct. Debbie Lyn claims that he made sexually charged comments to her and touched her buttocks area on one occasion. (Tr. 362-367). Cherry Mellad testified that Williams called her "a piece of crap" and other Jamaican slurs and that for months prior to Williams' discharge, he had been unable to perform basic job duties. (Tr. 236, 280-281, 286). Earl Mellad recalled an incident where Williams was purported to have acted in a hosile manner toward another employee. (Tr. 475). Both Alvin Wilson and Cherry Mellad insist he was found to be drinking on the job on several occasions.[36] These accounts depict a troubled employee.

On the other hand, Respondents insist that Williams was a highly valued employee who they had no intention to fire or otherwise lose as an employee. Harrington called him "one of my best workers" and Mellad called him a "very lovely man." (Tr. 125, 133 – 134). This is consistent with Williams' testimony that he was never disciplined; he testified, "From I'm being working there I never get no warning from the boss or nobody. All I can get is recommendation from the boss, from Sharon and from Alvin and from everybody inside there says I am really am the hard worker."[37] (Tr. 125).

Second, and as mentioned above, Respondents' witnesses are individually not credible. Debbie Lyn testified about an incident on November 18 that absolutely could not have happened.

[36] Despite the apparent seriousness of these infractions, Respondents claim at hearing to have only issued Williams one written Warning Notice on November 7, 2016, which Williams denies ever receiving. Respondents' explanation of this Warning Notice is highly improbable. First, it contradicts Mellad's affidavit testimony that she issued Williams "so many write ups" as well as her hearing testimony that she did not begin issuing employees written discipline until January 2017. (Tr. 257 – 263, 287; GC Ex. 7, ¶ 12). Further, based on Mellad and Harrington's testimony, Williams would not have received the Warning Notice until he received his November 18 paycheck, which he did not receive until after he was discharged. See footnote 21.

[37] Respondents admit that in most cases, they merely counseled Williams for these infractions took no disciplinary action against Williams for such these serious workplace issue calls into question the credibility of the witnesses.

She claimed to have spoken to Williams at the DO & CO facility at 1:30 pm, at which time Williams was nowhere near the facility.[38] Earl Mellad and Alvin Wilson testified about incidents of misconduct for which Williams neither received notice nor discipline.

The testimony offered by Harrington and Mellad, Respondents' primary witnesses Harrington, is particularly unconvincing. Harrington repeatedly insisted that Respondents did not discharge Williams and that he was uninvolved with Mellad's November 21 decision to take him off the schedule. That testimony stands in stark contrast to the letter he submitted to Region 29 that stated clearly that "Mr. Williams's services were no longer needed and he was terminated on November 20, 2016." (GC Ex. 9(b)).

Cherry Mellad's testimony is replete with inconsistencies and untruths as mentioned above. In addition, there are significant differences the events as Mellad described them in a May 2017 affidavit and as she recalled them during the hearing. (GC Ex. 7). For example,

- Mellad testified that about Respondents only ever issued Williams one written warning, a November 7, 2016 Warning Notice for drinking on the job. (Tr. 257 – 263). She later contradicted herself when she testified that she did not issue any employee written discipline until the beginning of 2017. (Tr. 287). In further contradiction is her affidavit testimony where she testified that in or about September / October 2016, after receiving complaints about Williams' drinking on the job, she explicitly opted not to write him because he already had "so many write-ups" in his disciplinary file. (GC Ex. 7, ¶ 12). Her affidavit makes no mention of the November 7 Written Notice that if it existed, would have been specifically responsive to questions.

[38] Williams' whereabouts this day are described clearly and in detail by his sister-in-law who spent most of the day with him.

- In her affidavit, she describes speaking to Williams on November 18. During her hearing testimony, she denied that this conversation took place. (Tr. 249, GC Ex. 7, ¶ 16).
- Mellad originally testified that Williams picked up his final paycheck on November 21 but after confronted with her inconsistent affidavit testimony, she became very unsure when he came to pick up his check, whether he picked up one or two paychecks and whether she spoke to Harrington before or after this fact. (GC. Ex. 7, ¶ 19[39] ; Tr. 253, 303-305).[40] Williams is clear that he

D. Williams Must Be Reimbursed for His Search for Work and Work Related Expenses In Addition to Backpay and Reinstatement

As a result of Respondent's unfair labor practices, the General Counsel seeks an Order providing the Board's traditional make-whole remedies, including reinstatement and backpay for Williams, and the posting of a Notice to Employees addressing each of Respondent's unfair labor practices established in this case. Additionally, as part of a make-whole remedy, Respondent should be required to reimburse Williams for the search-for-work and work-related expenses resulting from his unlawful discharge.

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to continue working for the employer. *Deena Artware, Inc.,* 112 NLRB 371, 374 (1955); *Crossett Lumber Co.,* 8 NLRB 440, 498 (1938).[41]

[39] Mellad explained that the first sentence of ¶ 19 of her affidavit should read, "I did not see or speak to Williams until the following Friday, November 25."

[40] Williams' testimony was clear that he picked up one paycheck about November 21 and one about November 25. (Tr. 117-118). This testimony is consistent with check registers for each of Williams final paychecks, which show that he cashed them on November 22 and November 28, respectively. (GC Ex. 3).

[41] These expenses might include: increased transportation costs in seeking or commuting to interim employment, *D.L. Baker, Inc* , 351 NLRB 515, 537 (2007); the cost of tools or uniforms required by an interim employer, *Cibao*

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.,* l09 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also N. Slope Mech.,* 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses.[42]

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.,* 356 NLRB No. 8 at *3 (2010). This means the remedy should be calculated to restore "the situation, as nearly as

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Meat Products, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.,* 151 NLRB 1 1 13, 1114 (1965); room and board when seeking employment and/or working away from home, *Aircraft & Helicopter Leasing,* 227 NLRB 644, 650 (1976); contractually required union dues and/or initiation fees, if not previously required while working for Respondent, *Rainbow Coaches,* 280 N LRB 166, 190 (1986); and/or the cost of moving if required to assume interim employment,*Coronet Foods, Inc.,* 322 NLRB 837 (1997).

[42] The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. *In Re Midwestern Pers. Servs., Inc. ,* 346 N LRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners & Serv. Employees Int'l Union, Local 32bj,* 361 NLRB No. 57 at *2 (2014) (quoting *Phelps Dodge).* The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions – i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *Hobby v. Georgia Power Co.,* 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. U.S. Dep't of Labor,* No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002). In these circumstances, a change to the existing rule regarding search-for-work and work- related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole . . ." *Don Chavas, LLC,* 361 NLRB No. 10 at *3 (2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[43] These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson*

[43] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.,* 104 NLRB 514, 516 at *2 (1953).

Hosp. Corp., 356 NLRB No. 8 at *1 (2010) (interest is to be compounded daily in backpay cases).

IV. CONCLUSION

Counsel for the General Counsel submits that, based on the entire record, a preponderance of the credible evidence supports all of the allegations of the Complaint.

Therefore, it is respectfully urged that the Administrative Law Judge find that Respondents committed violations of Sections 8(a)(1) of the Act and grant any and all relief appropriate under the Act, including the permanent reinstatement of Pervis Williams, make whole relief for Mr. Williams, including search for work and work-related expenses, and the posting of a notice at Respondents' facility in which employees are assured of their Section 7 rights

DATED AT Newark, New Jersey this 29th day of December 2017.

/s/ CPB /s/

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